Supreme Court, U.S.
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NO.

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER, 1994 TERM

VICTOR M. BARDNEY,
PETITIONER,

VS.

THE UNITED STATES OF AMERICA,
RESPONDENT.

Petitioner, Victor Bardney's

PETITION FOR A WRIT OF CERTIORARI

To The United States Court Of Appeals
For The Seventh Circuit

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THE QUESTIONS PRESENTED FOR REVIEW ARE:

1. **Whether the trial court's reliance on Petitioner, Bardney's commission of an offense, for which the jury had acquitted him, as grounds for increasing his imprisonment sentence by 100 months, violated Bardney's constitutional rights against double jeopardy, trial by jury, due process, fundamental fairness and this Court's holdings in Ashe v. Swenson, 397 US 436 (1970)?**

2. **Whether the trial court's denial of an evidentiary hearing on Petitioner, Bardney's motion and affidavit to suppress his confession on the disputed ground that Bardney did not understand his Miranda·warnings, and the trial court's contrary finding, without an evidentiary hearing, that Bardney did understand his Miranda warnings, violated Bardney's constitutional privilege against self-incrimination, confrontation, cross examination, due process, fundamental fairness and this Court's holdings in Miranda v. Arizona, 475 US 412 (1966)?**

3. **Whether the trial courts' denial of Petitioner, Bardney's motion for the government's identification and production of the government's undercover**

cooperating individuals violated Bardney's Fifth and Sixth Amendment constitutional rights to compel the attendance of witnesses in his behalf, to prepare and defend, to fundamental fairness, due process and this Court's holdings in Roviaro v. United States, 353 US 25 (1957)?

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UNOFFICIAL REPORT OF OPINION

The opinion of the Court of Appeals for the Seventh Circuit sought to be reviewed was ordered by that court, pursuant to that Court's Circuit Rule 53, not to be published or cited as authority. The unpublished opinion is set forth in the Appendix hereto, pages 1-10. No other opinion by any other court has been delivered or reported in this case.

JURISDICTIONAL STATEMENT

I. The date of the entry of the judgment of the Court of Appeals affirming petitioner's conviction, which is sought to be reviewed, was February 1, 1995.

II. Petitioner's Petition for Rehearing was denied on March 3, 1995.

IV. Title 28 USC, §1254(1), Rule 10(1)(3) of the Rules of the United States Supreme Court, and Article 3 of the Constitution of the United States of America confer on this Court jurisdiction to review the judgment in question by Writ of Certiorari.

THE CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Fifth Amendment to the Constitution of the United States:

"...nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property without due process of law;...".

The Sixth Amendment to the Constitution of the United States:

"In all criminal prosecutions, the accused shall enjoy the right...to have compulsory process for obtaining witnesses in his favor,...".

18 USC 2:

"(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principle."

21 USC 846:

"Any person who attempts or conspires to commit any offense defined in this subchapter shall be subject to the same penalties as those prescribed for the offense, the commission of which was the object of the attempt or conspiracy."

18 USC 924(c)(1):

"Whoever, during and in relation to any crime of violence or drug trafficking crime, (including a crime of violence or drug trafficking crime which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which he may be prosecuted in a Court of the United States, uses or carries a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime, be sentenced to imprisonment for five years...".

STATEMENT OF THE CASE
Basis of Federal Jurisdiction
The Indictment

The three-count indictment in the cast at bar, which is set forth hoc verba, Appendix-Indictment pages 12-17, alleged that the Defendants, Samuel J. Benson, Lawrence Spinks and Victor M. Bardney, Petitioner herein, violated 21 USC 846 and 18 USC 2, count one; 18 USC 846, count two; and 8 USC 924(c)(1) and §2, count three, the basis for federal jurisdiction in the court of first instance, the United States District Court.

Count one alleged that from August, 1992 to December 3, 1992, the said defendants, in Cicero, Illinois, conspired to possess with intent to distribute cocaine and marijuana. Count one alleged that it was a part of the conspiracy that the said defendants,

> "2. ...engaged in several conversations with **an individual cooperating with the Drug Enforcement Administration, DEA,** for the purpose of purchasing marijuana and cocaine from **the cooperating individual.**
>
> 3. ...**The cooperating individual ("CI")** introduced Defendants, Samuel J. Benson and Victor M. Bardney, to **another cooperating individual who was posing as the source of the cocaine and marijuana. (CI #2).** At this meeting, it was agreed that defendants...would meet with **CI #2** to purchase...cocaine and...marijuana...from **CI #2.**

4. ...Defendant, Victor M. Bardney, had a telephone conversation with the **CI #2**, in which...they confirmed the meeting schedule for the following day.

5. ...Defendants...traveled to a shopping center parking lot...where Defendant, Benson, met with **CI #2** and a **special agent**...Defendant, Benson, showed **CI #2** a large quantity of money which was to be used to purchase the narcotics,...

6. ...While Defendant, Samuel J. Benson, met with **CI #2** and the **special agent**, Defendants, Victor M. Bardney and Lawrence Spinks, conducted counter-surveillance...

7. ...Defendants...brought with them to the meeting with **CI #2** and the **undercover agent** approximately $86,000 to be used to purchase cocaine and marijuana,...".

Count two alleged that the Defendant, Benson and Defendant-Petitioner, Bardney, on December 3, 1992, in Cicero, Illinois, attempted to possess with intent to distribute cocaine and marijuana. The three aforesaid defendants were charged in count three with having, on December 3, 1992, in Cicero, Illinois, used a firearm during the commission of a drug trafficking offense.

Defendant, Benson, pled guilty and was sentenced to 108 months imprisonment. Defendant, Spinks, and Petitioner, Bardney, were jointly tried by a jury. Petitioner, Bardney's defense was mistaken identification, that he, Petitioner, Bardney was not that person with whom the

government undercover agents engaged in conversations to sell narcotics, and Bardney's attorney so stated to the jury in his opening statement to the jury.

Statement Of The Facts

It was the government's evidence that on December 1, 1992, Sergio Garcia, a government Drug Enforcement Administration undercover cooperating individual, had a conversation and negotiated with persons he identified as the Defendant, Benson, and Petitioner, Bardney for their purchase of 2 kilograms of cocaine and 50 pounds of marijuana from Garcia for $89,250. Garcia admitted that he had never seen Petitioner, Bardney before and there was no evidence, except Bardney's (dubious) confession, which corroborated Garcia's identification of Bardney. The drug negotiation conversation, which was tape recorded by Garcia, occurred in the Maywood, Illinois residence and in the presence of another unidentified government undercover DEA cooperating individual and her son. They agreed that arrangements for the drug-money deliveries were to be made over the telephone on the following day.

The following day, Garcia received a telephone call from a person he identified as Petitioner, Bardney and they

agreed that the drugs and money were to be delivered and exchanged on the following day, Saturday, December 3, 1992, at about noon at a shopping mall parking lot in Cicero, Illinois. This telephone conversation was also tape recorded by Garcia.

When Garcia and the agents arrived at the parking lot the next day, Benson showed Garcia $89,250 in his car for the purchase of the drugs. Benson was thereupon arrested.

Bardney was on the parking lot when Garcia and the agents arrived, but they did not see Bardney arrive, they did not know when Bardney arrived and they did not see Bardney in the company of anyone or engage in any conversation with anyone while he was on the parking lot. As the agents approached Bardney on the parking lot, an agent testified that he saw Bardney throw some keys under a car. The agents arrested Bardney and they tried the keys Bardney had thrown under the car on the doors of various cars on the lot. The keys fit a car that was registered to a William Bardney. The agents found a loaded pistol in the car.

Lawrence Spinks was arrested in a fast food restaurant in the mall, in which the agents testified Spinks

entered when he observed Benson and Bardney being arrested.

Defendant, Spinks, and Petitioner, Bardney, presented no evidence.

After three days of deliberation, the jury returned not guilty verdicts on all counts, as to Spinks. As to Petitioner, Bardney, the jury deliberated over a period of eight days, during which it sent four notes to the trial judge. In two of the notes, the jury stated that the jurors were **"ADAMANT IN THEIR OPINIONS"**, and, in essence, that they were hopelessly deadlocked as to Bardney (Tr. 1166, 1176). The jury's third note informed the trial judge that a juror had a class beginning the following (eighth) day of deliberations. The jury's fourth note, on the eighth day of deliberations, requested, "a transcript of the trial". The trial judge responded that it would take four to five days for the court reporter to prepare the trial transcript (Tr. 1187). Ninety-seven minutes later, the jury announced that it had arrived at Bardney's verdicts, (Tr. 1189). The jury found Petitioner, Bardney not guilty on counts one and three, the narcotics conspiracy count and the use of a firearm in the commission of a drug offense count, respectively, and guilty on count two, the attempted narcotics possession count.

Considering the nature of the alleged offenses, the government's evidence, the jury's four notes to the trial judge and the judge's response, it is quite apparent that the jury's aforesaid Bardney verdicts were an inconsistent and contradictory compromise. Petitioner, Bardney, was sentenced to 160 months imprisonment.

ARGUMENTS FOR ALLOWANCE OF THE WRIT

I

The Trial Court's Reliance On Petitioner, Bardney's Commission Of An Offense, For Which The Jury Had Acquitted Him, As Grounds For Increasing His Imprisonment Sentence By 100 Months, Violated Bardney's Constitutional Rights Against Double Jeopardy, Trial By Jury, Due Process, Fundamental Fairness And This Court's Holdings In Ashe v. Swenson, 397 US 436 (1970)?

The trial court refused to follow this Court's holdings in Ashe vs. Swenson, 397 US 436 (1970) and violated Petitioner, Bardney's double jeopardy, jury trial, due process and fundamental fairness constitutional rights when **the trial court relied on petitioner's commission of an offense, for which the jury had acquitted him, as grounds for increasing his imprisonment sentence by 100 months.**

The pre-sentence report recited (Tr. 1203) that, "Since a dangerous weapon was possessed during the offense charged in Count 2, the base level is increased by

two levels...". Bardney's counsel objected to this increased base level on the ground that the jury had found Bardney not guilty under counts one and three of the possession of a dangerous weapon during the commission of this count two drug trafficking offense. Bardney's attorney pointed out that paragraph 7 of count one of the indictment alleged that it was a part of the conspiracy that the defendants took a gun with them to the meeting at the parking lot in Cicero, Illinois to provide security, and that the jury had found Bardney not guilty under count one. Bardney's attorney further pointed out that "count 3 of the indictment alleged that, on or about December 3, 1992, the defendants carried a firearm during and in relation to the commission of a drug trafficking crime and that the Defendant, Bardney had been found not guilty by the jury of this offense as well." Bardney's attorney urged (Tr. 1204) that Bardney, having been found not guilty by the jury of the commission of those acts, under counts one and three, that to increase his imprisonment sentence based on his commission of those acts for which he had been charged, tried and found not guilty by the jury, violated the constitutional prohibition against double jeopardy, trial by jury, due process and fundamental fairness, and constituted an unconstitutional

invalidation of the jury's not guilty verdicts by the trial court.

In spite of the foregoing, the trial judge concluded and stated (Tr. 1211), **"that a gun was possessed and was a part of the drug transaction itself. THERE IS NO DOUBT ABOUT THAT."** Bardney's counsel again pointed out to the court that the jury had found Bardney not guilty of the commission of the gun possession offenses under counts one and three, and **"SO THEY HAD TO HAVE HAD SOME DOUBT."**

The trial judge erroneously overruled Bardney's objections and raised the base level by two points on the count two narcotics offense and, thus increased Bardney's imprisonment sentence by 100 months, based on Bardney's commission of the offense for which he had been acquitted by the jury, thereby, somewhat adding credence to the current adage that **"federal judges no longer sentence defendants -- sentencing guidelines do." (THESE SENTENCING GUIDELINES ALONE MERIT FURTHER REVIEW BY THIS COURT.)**

The United States Court of Appeals' unpublished opinion in the case at bar did not address these crucial constitutional issues, stating, that because they were,

"wholly without merit, we decline to address them". The trial court and the United States Court of Appeals erred.

In Ashe v. Swenson, 397 US 436 (1970), this Court held that the double jeopardy clause incorporates the doctrine of collateral estoppel, and that:

> **"When an issue of ultimate fact has once been determined by valid and sound judgment, that issue cannot again be litigated between the same parties..." 397 US 436, 443.**

In Dowling vs. United States, 493 US 342, "at petitioner's trial for various offenses arising out of a bank robbery, testimony was admitted on the issue of the petitioner-defendant's guilt, under Rule 404(b) of the Federal Rules of Evidence, relating to an alleged crime that the defendant had previously been acquitted of committing." This Court approved. The case at bar, however, does not involve the admission as trial evidence, evidence of petitioner's commission of an offense for which petitioner had been acquitted, on the issue of Petitioner's guilt, under Rule 404(b) of the Federal Evidence Rules. Rather, this case involves the trial court's reliance on Petitioner, Bardney's commission of an offense for which the jury had acquitted him, as grounds for increasing his imprisonment sentence by 100 months, and is exactly what

Justice Brennan vociferously objected to in his **Dowling** dissenting opinion, in which Justice Marshall and Justice Stevens joined, Justice Brennan eloquently warned, 493 US 342, 363:

> **"Indeed, the court's reasoning could apply even though broadly to justify the introduction of evidence of a prior offense for which the defendant had been acquitted in order to enhance a defendant's sentence under a sentencing scheme that requires proof by less than a reasonable doubt...Only by ignoring the principles upon which the collateral estoppel doctrine is based is it possible for the Court to tip the scales this far in a prosecutor's favor."**

Justice Brennan's foregoing dire prophecy in **Dowling** has now been fulfilled and has become a tragic unconstitutional reality in the case at bar. Petitioner, Bardney's increased imprisonment sentence of 100 months is for his commission of the offense of the possession of a firearm during the commission of the drug trafficking offense for which the jury had acquitted him and which offense the government was unable to prove Bardney's guilt beyond a reasonable doubt, the degree of proof which is constitutionally mandated for the imposition of any imprisonment sentence for the commission of a criminal offense. The trial court's ruling and sentence, and the United States Court of Appeals' total disregard of this ruling

and sentence by the trial court require reversal. It is not at all surprising that the United States Court of Appeals ordered its opinion in the case at bar not to be published or cited as authority, under its Circuit Rule 53. This rule, it has been said, "**has surreptitiously created for that court a hidden cesspool for its inappropriate and invalid opinions, concealed from the legal profession's scrutiny and secreted from public view.**" We therefore pray that the instant petition be granted.

II

The Trial Court Violated Bardney's Fifth And Sixth Amendment Constitutional Rights Against Self-Incrimination, To Cross Examination, Confrontation, Due Process And Fundamental Fairness And This Court's Holding In Miranda v. Arizona, 475 US 412 (1966), When It Denied Bardney An Evidentiary Hearing On His Motion And Affidavit To Suppress His Statements And When It Denied His Motion To Suppress His Statements.

The trial court refused to follow this Court's holdings in Miranda v. Arizona, 475 US 412 (1966), and denied Petitioner, Bardney's self-incrimination, confrontation, cross examination, due process and fundamental fairness constitutional rights when **the trial court denied petitioner and evidentiary hearing in his motion and affidavit to suppress his statements, and when it denied petitioner's motion to suppress his statements.**

Bardney filed a motion and affidavit to suppress his statements. Bardney's suppression motion and affidavit stated, **and the arrest report of government Drug Enforcement Agent Ibanez who arrested and advised Bardney of his Miranda rights, also stated** that, (a) DEA Agent Ibanez advised Bardney of his Miranda rights; (b) Bardney did not understand his Miranda rights; (c) Agent Ibanez had to read Bardney his Miranda rights more than once; (d) Agent Ibanez noted that Bardney still did not understand his Miranda rights; (e) Agent Ibanez did not attempt to interrogate Bardney; (f) Bardney did not make any statement to Agent Ibanez; (g) Agent Ibanez had Bardney sign an acknowledgment that he had given Bardney his Miranda rights; and (h) Ibanez ascertained that Bardney had a very limited education and could not read. Additionally, Agent Ibanez testified at trial (Tr. 675-679) that after he gave Bardney his Miranda rights, he didn't ask Bardney any questions.

Bardney's suppression motion and affidavit further stated that hours after Agent Ibanez had declined to question Bardney, Agent Grobe, the DEA group leader, told Bardney his Miranda rights and took an incriminating statement from him. Bardney's suppression motion and

affidavit further stated that Bardney had a limited education, had a serious comprehension problem, was functionally illiterate, depended on other persons to read and assist him in understanding concepts and that during his conversation with Agents Ibanez and Grobe, he did not understand his rights under Miranda. Bardney's motion and affidavit asserted that his answers to Agent Grobe's questions violated his Fifth and Sixth Amendment constitutional rights, and he sought to suppress his answers as evidence because they were given as a result of his inability to understand the meaning of his Miranda rights, and were involuntary.

The government filed its response to Bardney's motion to suppress. The government's response admitted that when Agent Ibanez gave Bardney his Miranda rights, Bardney acknowledged that he could not read and appeared not to understand the Miranda rights, and that Agent Ibanez did not question Bardney. The government's response admitted that hours later, Agent Grobe gave Bardney his Miranda rights and that Bardney answered Grobe's question and confessed, the substance itself of which was of questionable authenticity.

The government's response further admitted that "**in support of his motion to suppress the use of his statements, the defendant claims that his statements were involuntary because he was unable to understand the meaning of the repeated Miranda warning**". By reason thereof, the government's response necessarily conceded that "**[THE] UNITED STATES HAS NO OBJECTION TO THE COURT HOLDING A SUPPRESSION HEARING ON THESE ISSUES**", and that, "**the motion of the defendant to suppress his post arrest statement to Federal Agents should be denied FOLLOWING A HEARING**".

The trial judge expressly recognized that the factual disputes to be resolved were whether Bardney understood his Miranda rights and the voluntariness of his confession. The trial judge was constitutionally required to conduct an evidentiary hearing to resolve these factual controversies. The trial judge did not do so, however. It denied Bardney an evidentiary hearing on his suppression motion, denied his suppression motion and erroneously ruled:

> "Given the points conceded by the government and the proffer of the government, **the court finds it is more probably true than not true that the defendant had a full awareness of the rights he waived, the consequence of the waiver, the**

voluntariness of his relinquishment under a totality of the circumstances surrounding the giving of the statement. [Citations.] THE COURT...FINDS THE GOVERNMENT HAS SHOWN BY A PREPONDERANCE OF THE EVIDENCE THAT THE STATEMENTS WERE MADE VOLUNTARILY UNDER THE TOTALITY OF THE CIRCUMSTANCES."

It is elementary and fundamental that the trial court's determination and resolution of the controverted facts against petitioner, in the absence of an evidentiary hearing, violated constitutional fundamental due process, confrontation and cross examination, and the privilege against self-incrimination, Miranda v. Arizona, 475 US 412 (1966), and **Miranda's** multitudinous progenies. The trial court's commission of the foregoing egregious prejudicial errors requires allowance of the Petition for a Writ of Certiorari and reversal of Bardney's conviction.

Contrary to the government's and the trial court's aforesaid acknowledgments and concessions of the existence of the factual controversies of whether Petitioner, Bardney, understood his Miranda warnings and the voluntariness of his confession, the United States Court of Appeals unpublished opinion in the case at bar created, ab initio and sua sponte, that court's own contrary facts, when it stated:

"Bardney's affidavit filed with his motion to suppress, did not create a factual issue which required a hearing to resolve...NO FACTUAL DISPUTE CONFRONTED THE DISTRICT COURT, AND IT WAS WITHIN ITS DISCRETION TO DECIDE THE MOTION ON THE UNCONTROVERTED FACTS BEFORE IT WITHOUT A HEARING."

The trial court's denial of an evidentiary hearing to petitioner on petitioner's motion and affidavit to suppress his confession, and the affirmance thereof by the United States Court of Appeals on its stated sua sponte factually unsupported contrary grounds, are in conflict with and are diametrically opposite the opinion of this Court in **Miranda**, and so far departs from the accepted and usual course of judicial proceedings and is such a refusal to apply this Court's decision to the instant case as to call for an exercise of this Court's power of supervision.

III

The Trial Court's Denial Of Petitioner, Bardney's Motion For The Government's Identification And Production Of The Government's Unidentified Undercover Cooperating Individuals Violated Bardney's Fifth And Sixth Amendment Constitutional Rights To Compel The Attendance Of Witnesses On His Behalf, To Prepare And Present A Defense, To Fundamental Fairness And Due Process And This Court's Holdings In Roviaro v. United States, 353 US 25 (1957).

The trial court refused to follow this Court's holdings in Roviaro v. United States, 353 US 25 (1957) and violated Petitioner, Bardney's constitutional rights to compel the

attendance of witnesses on his behalf, due process, fundamental fairness and to prepare and present a defense when **the trial court denied petitioner's motions for the governments identification and production of the government's unidentified cooperating individuals (informers).**

The government's unidentified undercover cooperating individuals could have aided Bardney in establishing his defense of mistaken identification, the crucial and ultimate issue for the jury's determination. There was no other evidence, except Bardney's questionable confession, which corroborated Garcia's identification of Bardney as being that person with whom Garcia and the other government unidentified undercover cooperating individuals spoke and negotiated the drug sale.

The trial judge denied Petitioner, Bardney's motion for the government's identification and production of the government's unidentified undercover cooperating individuals (informers). This Court, in Roviaro v. United States, 353 US 25 (1957), under facts and circumstances practically identical to those in the case at bar, reversed the defendant-petitioner's drug possession and sale convictions because the trial court denied the defendant's motion for

the government's identification and production of the government's undercover informer.

Count one of the indictment in the case at bar, and also in **Roviaro,** did not identify the persons with whom the defendants allegedly engaged in the narcotics conversations and transactions. This Court stated in **Roviaro**, 353 US 53, 65, footnote 15:

> "We think that the court erred also in denying, prior to trial, petitioner's motion for a bill of particulars, insofar as it requested **JOHN DOE'S IDENTITY AND ADDRESS.** Since count one expressly charged the petitioner with a sale of heroin to **JOHN DOE, IT WAS EVIDENT FROM THE FACE OF THE INDICTMENT THAT DOE WAS A PARTICIPANT IN AND A MATERIAL WITNESS TO THE SALE. ACCORDINGLY, WHEN THE NAME AND ADDRESS WERE THUS REQUESTED, THE GOVERNMENT SHOULD HAVE BEEN REQUIRED TO SUPPLY THAT INFORMATION OR SUFFER DISMISSAL OF THAT COUNT."**

Bardney filed his pretrial motion "for an order requiring the government to disclose the identities and addresses of any confidential informants who were present at or during the continuance of the alleged crimes set forth in the indictment...", and cited and relied on **Roviaro** as authority therefor. The government objected to Bardney's motion on the ground that the government feared for their safety. The trial judge erroneously denied Bardney's pretrial motion for disclosure of the identity, addresses and

production of the government's cooperating individuals. This trial court ruling is directly opposite this Court's rulings in **Roviaro.**

The trial court erroneously prohibited the elicitation on cross examination of the government informer witness, Garcia, the address where the narcotics conversations occurred (Tr. 197-200). The trial court also erroneously refused to allow Garcia to be cross examined on, or to disclose the names and identities of the government undercover informers or cooperating individuals in whose home and in whose presence and who participated in Garcia's drug transaction negotiation conversations supposedly with Petitioner, Bardney and Benson (Tr. 223-233). Bardney's attorney repeatedly urged to the court (Tr. 225-229) that under **Roviaro,** and Petitioner, Bardney's constitutional rights to due process and to compel the attendance of witnesses, he had a right to the cooperating individuals' identity and their production as witnesses on Bardney's behalf to aid and assist him in establishing his defense of misidentification by the government informant, Garcia.

The trial judge grossly misinterpreted and refused to follow the expressed holding in **Roviaro** when it erroneously ruled, (TR. 231-232):

> "The only person who thus far has identified Bardney as being there is this witness [Garcia] and he is subject to cross examination. You may examine him extensively on this question...But I'm going to take the position as argued by the government that **Roviaro** applies.",

and denied Bardney's identification and production requests.

After having wrongfully thwarted Bardney's attorney's cross examination efforts to establish from the government informer witness, Sergio Garcia, the address of the Maywood premises and the identities of the **cooperating individuals**, when it later appeared, however, that a limited disclosure was unavoidable if the government was to derive its desired evidentiary benefit from a memorandum prepared by Garcia, the following occurred.

On re-direct examination, Sergio Garcia related that after his conversation in the Maywood premises with Benson and the person he identified as Bardney, he prepared a memorandum of the meeting and conversation. In a side bar proceeding out of the hearing of the jury, an interpreter read from Garcia's memorandum, Government's

Exhibit 25, "Mike Grobe sent me to the house of the wife of Tony Valera at 7:00 p.m., Theresa. I arrived there about 6:35 p.m., December 1, 1992, 7:30 p.m. to 7:50 p.m. Theresa introduced me to Sam, and Victor...".

The court overruled Bardney's objections to the admission of Garcia's memorandum (Tr. 335-338). Thereupon, Bardney's counsel renewed Bardney's motions for leave to cross examine Garcia to illicit the Maywood address and the identity of the undercover informants, and for the government's production of them. The government resisted the motions on the ludicrous and fallacious grounds that, (1) the government had "put defense counsel in touch with the attorney for these individuals, and so the issue is mooted to any further discovery and disclosure obligation that the government has." (Tr. 519); and (2) "there has still been no showing of any particularized need for the defense to have any further disclosure than they already have of these informants." (Tr. 521). Bardney's counsel responded that Bardney had established a need for the government's undercover informants to establish his defense of mistaken identification (Tr. 525-536), and that (Tr. 628-629):

> "The government has an obligation to make them available to us...And they have not made them available for us. They have given me a phone number of a lawyer that he says apparently is going to represent them but I have not been able to find him. I called him and he has not responded... I have attempted to find him and locate Mr. Myer (Tr. 628). But in the context of this case, I submit to the court, that it is the duty and responsibility of the government to bring these people in here. And I think it's the duty and responsibility of the court to order the government to bring these people in here...I was denied the right to cross examine the man on the identity of these persons, or the location of the place where they could be found,...".

The trial judge again denied the motions, stating (Tr. 639):

> "[It] would be to work against the very privilege that **Roviaro** seeks to protect...So the need [for identification and production of the cooperating individuals] has not clearly been established in terms of count one which is a conspiracy."

The trial judge even prohibited, erroneously we submit, petitioner's attorney from commenting during closing argument on the failure of the government to call its unidentified cooperating individuals as trial witnesses. It is patently obvious that the government and the trial judge were in error and under a gross misapprehension of this Court's holdings in **Roviaro**. **Roviaro** demands allowance of the Writ and reversal of Petitioner, Bardney's conviction.

Based on the above and foregoing, it is also patently obvious that the following holding, in the unpublished

affirmance opinion of the Court of Appeals in the case at bar, is grossly inaccurate and is indeed absurd:

> "Regardless of the merits of Bardney's argument -- which we find suspect -- he cannot now complain, for the government gave Bardney an avenue to obtain the necessary information and Bardney simply did not follow it. The names of the CI'S were revealed at side bar, and the next day the AUSA gave Bardney's counsel the name and phone number of the attorney that was representing the CI. Bardney's counsel allegedly called the attorney and left a message but made no further efforts. Bardney could have subpoenaed the CI'S; he failed to do so. Thus, the government fulfilled any responsibility it might have had under Roviaro."

Parenthetically we note that if Tony Valera's wife, whose identity and whereabouts were excluded from and not revealed to Bardney's counsel, was, in fact, the cooperating individual in the case at bar, it is apparent why the government did not want to disclose her identity or produce her for Petitioner, Bardney, to call her as his witness. The government tacitly revealed that Tony Valera, while acting as a government cooperating witness, engaged in illegal drug trafficking, committed robberies of drug dealers and was even a suspect in a drug robbery murder, in which he had solicited government Drug Enforcement Agents to participate with him. Tony Valera was a government cooperating individual who had gone sour, and it is reasonable and justified to assume that the

government was therefore reluctant to have him or his wife as witnesses in any case. Only Tony Valera and his wife would know the price that they would seek to extract from the government for their continued cooperation with the government.

This Court's following language and holdings in **Roviaro** are analogous and clearly applicable to the case at bar:

> "The principle issue is whether the U.S. District Court committed reversible error when it allowed the government to refuse to disclose the identity of an undercover employee who had taken a material part in bringing about the possession of certain drugs by the accused, had been present with the accused at the occurrence of the alleged crime, and might be a material witness as to whether the accused knowingly transported the drugs, as alleged. For the reason stated hereafter, we hold that under the circumstances here present, this was reversible error. 353 US 53, p. 55.
>
> A further limitation on the applicability of the privilege [of nondisclosure of the cooperating informer's identity] arises from the fundamental requirements of fairness. **Where the disclosure of an informer's identity...is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way. 353 US 61.**
>
> The circumstances of this case demonstrate that **John Doe's possible testimony was highly relevant and might have been helpful to the defense...unless petitioner waived his constitutional right not to take the stand in his own defense, John Doe was his one material witness.** Petitioner's opportunity to cross examine

[the] Police was hardly a substitute for an opportunity to examine the man who had been nearest to him and took part in the transaction. **Doe had helped to set up the criminal occurrence and had played a prominent part in it...HE MIGHT HAVE THROWN DOUBT UPON PETITIONER'S IDENTITY**...The desirability of calling John Doe as a witness, or at least interviewing him in preparation for trial, was a matter for the accused rather than the government to decide.

Finally, the government's use against petitioner of his conversation with John Doe while riding in John Doe's car particularly emphasizes the unfairness of the nondisclosure in this case. **The only person, other than petitioner himself, who could controvert, explain or amplify [the officer's] report of this important conversation was John Doe. Contradiction or amplification might have borne upon petitioner's [defense of] knowledge of the contents of the package or might have tended to show an entrapment.**

This is a case where **The government's informer was the sole participant, other than the accused, in the transaction charged. The informer was the only witness in a position to amplify or contradict the testimony of government witnesses.**" 353 US 53, 64.

Under **Roviaro** and **Roviaro's** multitudinous progenies, we pray that the Petition for a Writ of Certiorari be granted and that Petitioner, Victor M. Bardney's conviction be reversed.

Respectfully Prayed and Submitted:

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APPENDIX

OPINION

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

Argued October 6, 1994

February 1, 1995

(Unpublished Order Not To Be Cited Per Circuit Rule 53)

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	) Appeal from the United States District Court for the Northern District of Illinois, Eastern Division
NO. 93-4037 v.	) NO. 92 CR 1043
VICTOR M. BARDNEY, Defendant-Appellant	) Charles R. Norgle, Sr., Judge

ORDER

Bardney appeals his conviction and sentence imposed by the district court. Bardney first claims that the district court erred in its decision to admit incriminating statements that Bardney made to the authorities after he was arrested. Bardney maintains that he did not understand his Miranda rights and therefore it was impossible for him to voluntarily waive them.

Additionally, Bardney asserts that the district court's decision not to hold an evidentiary hearing on the issue is error and necessitates overturning his conviction.

A district court does not need to hold an evidentiary hearing on a motion to suppress unless material facts are in dispute. United States v. Randle, 966 F.2d 1209, 1212 (7th Cir. 1992). The defendant has the burden of showing that there is such a factual dispute; vague, conclusory allegations do not suffice to create a factual issue. Id. Bardney's affidavit, filed with his motion to suppress, did not create a factual issue which required a hearing to resolve. In fact, the government's proffer of testimony in its opposition to the motion to suppress was merely a more detailed reiteration of Bardney's affidavit -- minus Bardney's conclusory allegations that, "the Accused did not understand or comprehend the words explaining his rights under Miranda," and "during the Accused's encounter with Grobe and Ibanez the Accused did not understand his rights under Miranda." No factual dispute confronted the district court, and it was within its discretion to decide the motion on the uncontroverted facts before it, without a hearing.

OPINION

Moving to the district court's denial of Bardney's motion to suppress his incriminating statement based on his alleged involuntary waiver of his Miranda rights, [1] we review the denial for clear error. United States v. Tipton, 3 F.3d 1119, 1121 (7th Cir. 1993). "A finding is clearly erroneous only if the reviewing court, on the basis of all the evidence, is left with the firm conviction that a mistake has been made." Id.

Before commencing custodial interrogation, the police must inform a suspect that he has certain tights, among them the right to remain silent and the right to have an attorney present during interrogation. Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966); United States v. LaGrone, No. 93-3383, 1994 WL 715284 (7th Cir. 1994). In order for the government to introduce a statement that was elicited through custodial interrogation, it must prove, by a preponderance of the evidence, that the defendant both voluntarily and knowingly waived his Miranda rights. Colorado v. Connelly, 479 U.S. 157, 168-69, 107 S.Ct. 515, 522-23 (1986); United States v. Hocking, 860 F.2d 769, 773-

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[1] Bardney claims that he did not voluntarily waive his Miranda rights, thereby invalidating his subsequent statement. He does not make the related, but distinct, argument that his incriminating statement was involuntary for other reasons.

74 (7th Cir. 1988). In order for a statement to be involuntary, the police must have acted coercively. See Connelly, 479 U.S. at 166-67, 107 S.Ct. at 521; United States v. Buckley, 4 F.3d 552, 559 (7th Cir. 1993). Moreover, a suspect need not have a full appreciation of the ramifications of waiving his rights for the waiver to be knowing. See Connecticut v. Barrett, 479 U.S. 523, 530, 107 S.Ct. 828, 832-33 (1987); Perri v. Director, dept. of corrections of Ill., 817 F.2d 448, 452 (7th Cir. 1987). Bardney presents no evidence of coercion, and that the officers read the defendant his rights multiple times, that he acknowledged that he understood the rights and subsequently waived them (especially when done in writing) supports a conclusion that the defendant knowingly waived his rights.

Bardney attempted to rebut this finding by stating that he "has a limited education and has a serious comprehension problem," and that he "is functionally illiterate and he depends on others to read and assist him with understanding concepts."[2] However, he was not forced to resort to his reading skills to understand his rights. After Agent Ibanez read Bardney his rights

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[2] On the other hand, Bardney completed three years of high school, told Ibanez he could write and was a registered voter.

and Bardney stated that he understood them, Ibanez asked Bardney to read the advice of rights form. Bardney responded that he could not read. Ibanez went through, line by line, the advice of rights form again, asking Bardney if he understood each line. Bardney responded that he did and initialed each line and thereafter signed the form, indicating that he was waiving his rights. Later, Agent Grobe again advised Bardney of his Miranda rights, and Bardney again stated that he understood his rights and wished to waive them and talk to the agents. He then made an incriminating statement. The district court did not commit clear error by concluding that Bardney understood his Miranda rights and voluntarily waived them.

Bardney next claims that the district court erred by denying his motion to identify and produce two of the DEA's cooperating individuals (CIs). Bardney argues that the CIs may have testified that he was not in fact the person that was in on the buy. In Rovario v. United States, 353 U.S. 53, 77 S.Ct. 623 (1957), the Supreme Court held that the needs demonstrated by the defendant must be balanced against the government's interest in protecting the flow of information and the informant's interest in avoiding danger and harassment. Bardney first moved for identification and production of the government's CIs in February

1993. He made no showing in his motion, as is required by Rovario, as to why identification was necessary. In response, the government pointed out the defect in Bardney's motion. On March 10, 1993, the district court denied Bardney's motion for identification of the government's CIs.

From that time until the middle of trial, Bardney failed to supplement his motion by explaining why the identities of the CIs were necessary. Then, on the 2nd day of trial, Bardney attempted to obtain the identities of the CIs through cross-examination of Sergio Garcia. At side bar, Bardney's counsel claimed that his defense was misidentification and that if put on the stand, the CIs may testify that Bardney was not at the buy. The district court ruled that under Rovario, the balance still weighed in favor of the keeping the CIs' identities secret.

Regardless of the merits of Bardney's argument -- which we find suspect -- he cannot now complain, for the government gave Bardney an avenue to obtain the necessary information and Bardney simply did not follow it. The names of the CIs were revealed at side bar, and the next day the AUSA have Bardney's counsel the name and phone number of the attorney that was representing the CIs. Bardney's counsel allegedly called the attorney and left a message, but made no further efforts.

Bardney could have subpoenaed the CIs; he failed to do so. Thus the government fulfilled any responsibility it might have had under Rovario.

Bardney also claims that the trial court erred in admitting evidence of Bardney's failure to file income tax returns from 1990 through 1992. The evidence admitted showed that Bardney had no legitimate source of income from 1990 through 1992. As we have previously held, evidence of the defendant's possession of large amounts of cash, especially when coupled with evidence that the defendant had no legitimate source of income, is probative as to the defendant's knowledge, intent and lack of mistake in a narcotics case. See United States v. Briscoe, 896 F.2d 1476, 1500 (7th Cir. 1990). The trial court did not err in admitting the evidence of Bardney's failure to file income tax returns.[3]

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[3] Bardney also complains that his right to cross examine witnesses against him was infringed. To show that Bardney had not filed income tax returns from 1990 through 1992, the government put on the stand Donald Gavey, a records officer. Mr. Gavey testified that he had searched the IRS records and had not found an income tax filing for Bardney.

On cross-examination, Bardney's counsel tried to inquire of the witness whether Bardney was required by the tax code to file a return. As the district court ruled, Bardney's counsel did not, and in all probability could not, provide the foundation to show that the witness was qualified to answer such a question. Mr.

OPINION

Bardney similarly argues that the district court erroneously admitted evidence, under Federal Rule of Evidence 404(b),[4] of a 1989 drug raid of an apartment he occupied. We will reverse a trial court's decision to admit 404(b) evidence only for clear abuse of discretion. Id. at 1499. We use a four-part test for admission of evidence under Rule 404(b):

> (1) the proffered evidence must be relevant to a matter in issue other than the defendant's propensity to commit the charged crime; (2) the prior bad act must be similar in nature and close in time to the crime charged; (3) the prosecution must establish that the defendant in fact committed the prior bad act; (4) and the probative value of the evidence must not be outweighed by its prejudicial effect.

See, e.g., United States v. Goodapple, 958 F.2d 1402, 1406-07 (7th Cir. 1992). In this case, the evidence of Bardney's presence at the apartment during the raid is relevant for two reasons. First, because conspiracy to possess and distribute cocaine,

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3 (continued...) Gavey's job with the IRS is to maintain documents, not to interpret the tax code. Thus, this claim is meritless.

4 Rule 404(b) provides, in relevant part:
Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident...

Count I of the indictment, is a specific intent crime, the evidence was relevant to Bardney's intent, knowledge and lack of mistake. Second, because the evidence presented also showed that Bardney's codefendant, Spinks, was present during the raid, it was relevant to show a criminal relationship between the two. See United States v. Hartman, 958 F.2d 774, 788 (7th Cir. 1992).

The evidence was sufficiently similar and close in time to the crime charged: drugs, weapons and large sums of cash were found at both scenes and the raid occurred only three years prior to the charged occurrence. United States v. Chamison, 760 F.2d 798, 807 (7th Cir. 1985).

The government presented sufficient evidence for the jury to conclude by a preponderance of the evidence that the prior act occurred. See Huddleston v. United States, 485 U.S. 681, 690, 108 S.Ct. 1496, 1501 (1988); United States v. York, 933 F.2d 1343, 1352 (7th Cir. 1991). An officer that participated in the raid testified to Bardney's and Spinks' presence during the raid and to the presence of drugs, money and weapons. Moreover, the district court allowed Bardney to cross-examine the witness

concerning the raid.[5]

Finally, the district court determined that the probative value of the evidence was not outweighed by the danger of undue prejudice, and we agree. We find no abuse of discretion in the district court's admission of the 1989 raid evidence.

As the balance of Bardney's claims are wholly without merit, we decline to address them. Bardney's conviction and sentence are AFFIRMED.

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[5] Bardney argues that, because he was acquitted of all charges related to the 1989 raid, the court should not have admitted the evidence. The Supreme Court has held, however, that acquittal of a charge does not prevent a prosecutor from admitting evidence under Rule 404(b) of conduct that comprised the previous charge. See Dowling v. United States, 493 U.S. 342, 348-49, 110 S.Ct. 668, 670 (1990).

Additionally, Bardney claims that the district court erred by preventing him, from bringing out a cross examination that Bardney was in fact acquitted of all charges stemming from the 1989 raid. While in many cases it will be prudent to allow such evidence in, so as to prevent the danger of undue prejudice against the defendant, such a decision is within the district court's discretion. In this case, the district court determined that such evidence would possible confuse the jury. We find no abuse of discretion in so ruling.

APPENDIX

DENIAL OF REHEARING

United States Court of Appeals
for the Seventh Circuit
Chicago, Illinois 60604

March 3, 1995

Before

Hon. JOHN L. COFFEY, Circuit Judge

Hon. DANIEL A. MANION, Circuit Judge

Hon. MICHAEL S. KANNE, Circuit Judge

UNITED STATES OF AMERICA, Plaintiff-Appellee,	) Appeal from the United) States District Court for) the Northern District of) Illinois, Eastern Division
NO. 93-4037 v.	)
	) NO. 92 CR 1043
VICTOR M. BARDNEY, Defendant-Appellant	) Charles R. Norgle, Sr.,) Judge

ORDER

On consideration of the petition for rehearing filed in the above-captioned case, all of the judges on the original panel have voted to deny the petition for rehearing.

IT IS ORDERED that the petition for rehearing is hereby DENIED.

APPENDIX

INDICTMENT

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

JAN. 05 1993
JUDGE NORGLE

UNITED STATES OF AMERICA	)	
	)	No. 92 CR 1043
v.	)	Violations: Title 21,
	)	United Sates Code,
SAMUEL J. BENSON,	)	Section 846; Title 18,
VICTOR M. BARDNEY, and	)	United States Code,
LAWRENCE SPINKS	)	Sections 924(c) and 2

COUNT ONE

THE SPECIAL OCTOBER 1992-II GRAND JURY charges:

1. Beginning in or about August 1992 ad continuing until on or about December 3, 1992, in Cicero, in the Northern District of Illinois, Eastern Division, and elsewhere,

SAMUEL J. BENSON,
VICTOR M. BARDNEY, and
LAWRENCE SPINKS,

defendants herein, conspired with each other knowingly and intentionally to distribute and to possess with intent to distribute kilogram quantities of cocaine, a Schedule II Narcotic Drug Controlled Substance and approximately fifty pounds of marijuana, a Schedule I Narcotic Drug Controlled Substance, in

violation of Title 21, United States Code, Section 841(a)(1); and defendants aided and abetted that conspiracy.

2. It was a part of the conspiracy that between August 1992 and November 1992, defendants SAMUEL J. BENSON and VICTOR M. BARDNEY engaged in several conversations with an individual cooperating with the Drug Enforcement Administration (DEA) for the purpose of purchasing marijuana and cocaine from the cooperating individual.

3. It was further a part of the conspiracy that on or about December 1, 1992, the cooperating individual ("CI") introduced defendants SAMUEL J. BENSON and VICTOR M. BARDNEY to another cooperating individual who was posing as the source of the cocaine and marijuana. ("CI #2"). At this meeting it was agreed that defendants SAMUEL J. BENSON and VICTOR M. BARDNEY would meet with CI #2 on December 3, 1992 at Cicero and Cermak Avenues, to purchase two kilograms of cocaine for $21,500 per kilogram and fifty pounds of marijuana for $950 per pound from CI #2.

4. It was further a part of the conspiracy that on or about December 2, 1992, defendant VICTOR M. BARDNEY had a telephone conversation with the CI #2, in which, using coded

language, they confirmed the meeting scheduled for the following day.

5. It was further a part of the conspiracy that on or about December 3, 1992, defendants SAMUEL J. BENSON, VICTOR M. BARDNEY, and LAWRENCE SPINKS traveled to a shopping center parking lot at Cermak and Cicero, where defendant BENSON met with CI #2 and a Special Agent of the Northeastern Metropolitan Enforcement Group who was acting in an undercover capacity and posing as the supplier of the marijuana and the cocaine, and they discussed the proposed transaction. Defendant BENSON showed CI #2 a large quantity of money which was to be used to purchase the narcotics, and indicated to the Special Agent that defendants BARDNEY and SPINKS were there to protect the transaction.

6. It was further a part of the conspiracy that on or about December 3, 1992, while defendant SAMUEL J. BENSON me with CI #2 and the Special Agent, defendants VICTOR M. BARDNEY and LAWRENCE SPINKS conducted surveillance and provided protection to defendant BENSON.

7. It was further a part of the conspiracy tat on or about December 3, 1992, defendants SAMUEL J. BENSON, VICTOR M. BARDNEY, and LAWRENCE SPINKS brought with

them to the meeting with CI #2 and the undercover agent approximately $86,000 to be used to purchase two kilograms of cocaine and fifty pounds of marijuana, for the purpose of providing security for the transaction.

8. It was further a part of the conspiracy that defendants concealed and hid, and caused to be concealed and hidden the purposes of and acts done in furtherance of the conspiracy.

All in violation of Title 21, United States Code, Section 846 and Title 18, United States Code, Section 2.

INDICTMENT

COUNT TWO

The SPECIAL OCTOBER 1992-II GRAND JURY further charges:

On or about December 3, 1992, in Cicero, in the Northern District of Illinois, Eastern Division,

SAMUEL J. BENSON,
VICTOR M. BARDNEY, and
LAWRENCE SPINKS,

defendants herein, knowingly did attempt to possess with intent to distribute fifty pounds of marijuana, a Schedule I Narcotic Drug Controlled Substance and two kilograms of cocaine, a Schedule II Narcotic Drug Controlled Substance;

In violation of Title 18, United States Code, Section 846.

INDICTMENT

COUNT THREE

The SPECIAL OCTOBER 1992-II GRAND JURY further charges:

On or about December 3, 1992, in Cicero, in the Northern District of Illinois, Eastern Division,

SAMUEL J. BENSON,
VICTOR M. BARDNEY, and
LAWRENCE SPINKS,

defendants herein, used and carried a firearm, namely one Smith and Wesson model 39-2 9 mm. semi-automatic pistol, serial number 701641, during and in relation to the commission of a drug trafficking crime for which the defendants may be prosecuted in a court of the United States, that is a violation of Title 21, United States Code, Section 846, as more fully set forth in Count One of this indictment;

In violation of Title 18, United States Code, Section 924(c)(1) and Section 2.

A TRUE BILL:

_____
FOREPERSON

_____
UNITED STATES ATTORNEY